Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1994

In Re: JAMES CONSTANT,

Debtor.

ARGEREY CONSTANT, JAMES CONSTANT

Petitioners,

v.

DAVID L. RAY, SALTZBURG, RAY & BERGMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Argerey Constant
James Constant
1603 Danbury Dr
Claremont, CA 91711
(909) 624-1801

Pro-per Petitioners

QUESTIONS PRESENTED

Should this Court resolve direct conflicts between the court of appeal's decision on jurisdiction and decisions on jurisdiction of this Court and other Circuit Courts on the following matters:

Does Civil Rule 12(h)(3) require that a court must decide a question of jurisdiction before it?

Does patent statute 35 USC 261 bar a court's jurisdiction to void the assignment of United States Patents by operation of California State laws?

Does judgement lien statute 28 USC 1962 bar a court's jurisdiction to hear a suit to void the assignment of United States patents by operation of California State laws?

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Petitioners,

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DAVID L. RAY, SALTZBURG, RAY & BERGMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Argerey Constant and James Constant, respectfully pray that a writ of certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit entered on September 12, 1994 affirming the district court's (1) dismissal of Mr. Constant's appeal for lack of standing, (2) dismissal of Mrs. Constant's appeal from certain bankruptcy court decisions for untimely filing, and (3) sanction award.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals appears in APPENDIX A to this Petition. The order dismissing appeal in the District Court for the Central District of California appears in APPENDIX B to this Petition.

JURISDICTION

The Court of Appeal's Opinion in this matter was entered on 12 September, 1994. This Court's jurisdiction is invoked under Title 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Jurisdictional statutes 28 USC 1334, 28 USC 157(b)(2)(H), 11 USC 544(b); Bankruptcy Rule 12(h)(3); judgement lien statute 28 USC 1962; and patent statute 35 USC 261 are set forth in APPENDIX C.

STATEMENT OF THE CASE

Before the petition for bankruptcy was filed, debtor had assigned 22 patents to his wife pursuant to patent statute 35 USC 261 governing the assignment of United States Patents and voidance thereof. Unsecured creditors had a judgement lien against the debtor pursuant to 28 USC 1962 and demanded payment. Debtor filed for bankruptcy and the bankruptcy trustee brought the instant case in the bankruptcy court against debtor's wife under California laws to recover patents allegedly transferred by debtor in fraud of creditors.

In his motion to intervene in the bankruptcy court, debtor argued that the court lacked jurisdiction to decide the voidance of assignment of United States patents under California state laws Cal. Codes 3439.04 and 3439.05. Debtor also argued that judgement lien statute 28 USC 1962 does not apply to patents and thus bars pre-petition judgement lien creditors (and the trustee who fills their shoes under 11 USC 544(b)) from bringing suit in California to recover United States patents from Mrs. Constant. Similar arguments were made by debtor and his wife in their appeals to the district and circuit courts.

The bankruptcy court denied debtor's motion to intervene and entered final judgement voiding the assignment of 22 patents by debtor to his wife under California state laws Cal. Codes 3439.04 and CC 3439.05. The district and appeals courts affirmed the bankruptcy court's holding that "Mr. Constant has no standing" to intervene and appeal. See APPENDICES A and B.

The bankruptcy court had jurisdiction pursuant to 28 USC 1334 [Bankruptcy Cases and Proceedings], 28 USC 157(b)(2)(H) [Proceedings to Determine, Avoid, or Recover Fraudulent Conveyances], and 11 USC 544 [trustee may avoid transfer of property]. The trustee's action was brought under 11 USC 544(b) which provides that the trustee may avoid any transfer by debtor "that is voidable under applicable law"[1]. As argued by the Constants, (1) the applicable non-bankruptcy law under 11 USC 544(b) is federal patent statute 35 USC 261 governing the assignment and the voiding of assignment of United States patents, (2) California state laws Cal. Codes 3439.04 and 3439.05 are inapplicable under 11 USC 544(b) because the voiding of assignment of United States patents is governed by 35 USC 261, and (3) judgement lien statute 28 USC 1962 does not apply to patents and thus bars action by creditors (and the trustee) to recover United States patents in California.

The court of appeals rejected the Constant's contentions that the bankruptcy and district courts lacked jurisdiction over

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[1] Section 544(b) gives the trustee the rights of actual unsecured creditors under applicable law to void transfers "under applicable law".

the trustee's action to recover United States patents from Mrs. Constant, without considering the "applicable law" issue under 11 USC 544(b) raised by petitioners. See n.1 (third sentence) in APPENDIX A. The court of appeals held that judgement lien statute 28 USC 1962 is inapplicable. See second paragraph at page 6 in APPENDIX A.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reasons that the opinions below conflict with previous decisions on jurisdiction of this Court and with the decisions of other Circuits.

The following points of law were overlooked by the appeals court:

1. Whether Bankr. R. 12(h)(3) requires a court to determine the jurisdictional issue raised by petitioners.

2. Whether federal patent statute 35 USC 261 is the applicable law under 11 USC 544(b) to void the transfer of United States patents.

3. Whether California state laws Cal. Code 3409.04 and 3409.05 are inapplicable under 11 USC 544(b) to void the transfer of United States patents.

4. Whether 28 USC 1962 bars prepetition judgement lien creditors (and the trustee who fills their shoes) from bringing suit in California to recover United States Patents from Mrs. Constant.

A. Civil Rule 12(h)(3) Requires That A Court Must Decide A Question Of Jurisdiction Before It

Reaching the merits of the jurisdictional issues raised by the petitioners does not require Mr. Constant to have standing and does not require Mrs. Constant to have filed a timely appeal. Bankr. R. 12(h)(3). The dismissal of appeals on grounds Mr. Constant lacked standing and Mrs. Constant lacked timely filing were made without considering Bankr. R. 12(h)(3) which permits raising a jurisdictional question at any time by suggestion of a party or non-party.

If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue. See numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2. A party may always suggest that the court lacks jurisdiction. *Moore's Federal Practice 2d ed. 1994* 12-237 n.21. Challenges to jurisdiction may be brought to the court's attention by persons other than parties to the action. *New York, v. Waterfront Airways, Inc.* (SD NY 1985) 620 F Supp 411. The court at any stage of the proceedings has a duty to raise such a defect on its own initiative. *Id* 12-239 n.23. The question whether or not there is subject matter jurisdiction is open to challenge at any time and at any level of adjudication. *Sadat v. Mertes* (CA7 1980) 615 F2d 1176, 54 ALR Fed 401. Subject matter jurisdiction can be challenged even after judgement. *Eisler v. Stritzler* (CA1 1976) 535 F2d 148, 21 FR Serv2d 1380; *Alexander v. Allister* (ND Ill 1976) 424 F Supp 277. An appellate court can consider the question of lack of subject

matter jurisdiction even on its own motion and even where the issue was not raised in the district court. *Wymard v. McCloskey & Co.* (CA3 1965) 342 F2d 495 *cert. den.* 382 US 823, 15 LEd2d 68, 86 SCt 52; *Rice v. Rice Foundation* (CA7 1979) 610 F2d 471; *Velez v. Crown Life Ins. Co.* (CA1 1979) 599 F2d 471. Even this Court will raise lack of jurisdiction of the subject matter on its own motion when the case reaches that late stage. *Louisville & N.R.Co. v. Mottley* (1908) 211 US 149, 53 LEd 126, 29 SCt 42.

Where there is no subject matter jurisdiction, a court has no discretion to ignore lack of jurisdiction. *Joyce v. United States (CA3 1973)* 474 F2d 215; *International Video Corp. v. Ampex Corp.* (CA9 1973) 484 F2d 634, 179 USPQ 260, 17 FR Serv2d 1240. A court lacking subject matter jurisdiction cannot render judgement, but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking. *Basso v. Utah Power & Light Co.* (CA10 1974) 495 F2d 906, 18 FR Serv2d 937.

The court's decisions below were made without an inquiry into the questions of subject matter jurisdiction under 11 USC 544(b), 35 USC 261 and 28 USC 1962 raised by petitioners.

B. Patent Statute 35 USC 261 Bars The Jurisdiction of A Court To Void The Assignment of United States Patents By Operation Of California State Law

1. *Re Peregrine* 116 BR 194,205 footnote 16 held that "while it appears that in California a judicial lien may, in fact, be used to encumber a copyright [or patent], that is only half the task; the court must also determine whether federal law insulates copyrights [or patents] from attachment by state court procedures". As to patents, state law is limited to determining the relative rights of creditors and patent exemptions. *Re Transportation Design* (BC SD Cal. 1985) 48 BR 635,639-40.

2. State law may not nullify the patent laws of Congress regulating their transfer. *Allen v. Riley* (1906) 203 US 347. Federal regulation under 35 USC 261 preempts state law. *Re Peregrine* 116 BR 194,206 footnote 17. Where federal law excludes state law, the court must apply the federal law. *Re Velikoplejki* (BC SD Fla 1985) 54 BR 534,538; *Re Transportation Design* (BC SD Cal 1985) 48 BR 635,639-40; *Unarco Industries, Inc. v. Kelley Co.* (CA7 1972) 465 F2d 1302,1305-06.

3. 35 USC 261 governs the assignment, and voidance of assignment of patents. Questions of patent assignments arise under the patent laws. *Crown Die & Tool Co. v. Nye Tool & Machine Works* (1923) 261 US 24, 67 LEd 516, 43 SCt 254; SCt background *US LEd Digest* Courts 291; *Geni-Chlor Int'l, Inc. v. Multisonics Dev. Corp.* (CA9 1978) 580 F2d 981, 200 USPQ 67.

4. In *Re Peregrine* (Bkrtcy. CD Cal 1990) 116 BR 194 the court was faced with the same issue which is now before this Court, i.e., should a creditor have the status of a bona fide purchaser, rather than that of a judicial lien creditor. Creditor Cap Fed argued that the term transfer in section 205(d) of the Copyright Act refers only to consensual transfers. The court rejected this argument

> "The Copyright Act's definition of transfer is very broad and specifically includes transfers by operation of law. 17 USC 201(d)(1). The term is broad enough to encompass not merely purchasers but lien creditors as well." *Id* 206. However, in footnote 17, the court distinguished the Patent Act "Unlike 17 USC 205(d), the priority scheme created under the Patent Act specifically applies only to subsequent purchasers and mortgagees. 35 USC 261. Lien creditors are neither." *Id* 206 footnote 17.

The court held that Cap Feds earlier prepetition unperfected security interest in NPI's **copyrights** is trumped by NPI's hypothetical judicial lien. Id 207.

5. Mrs. Constant's ownership of patents trumps the creditor's unsecured and unperfectable claim. Creditors are not secured creditors that could have perfected their security interests by filing in the Patent Office. Unsecured, unperfected interests have no claim to title under 35 USC 261. *Id* 206 footnote 17. Under 35 USC 261 the creditor must have the status of a bona fide purchaser, rather than that of unsecured creditor since 35 USC 261 refers only to consensual transfers.

Judgement lien creditors are not purchasers or mortgagees under 35 USC 261. Re Per*egrine* 116 BR 194,206 footnote 17. A judgement lien creditor is not a bona fide purchaser. *Re Mellor* (CA9 1984) 734 F2d 1396, 1941. Accordingly, creditors (and the trustee who fills their shoes) are not entitled to file their pre petition judgement lien in the Patent Office to void the assignment of Mrs Constant's patents under 35 USC 261. Nor does the trustee have rights under 11 USC 544(b) superior to those of unsecured creditors. By bringing its suit to recover patents under California law, the bankruptcy trustee has obtained rights not otherwise available to creditors under patent statute 35 USC 261.

C. Judgement Lien Statute 28 USC 1962 Bars The Jurisdiction Of A Court To Hear A Suit To Void The Assignment of United States Patents By Operation Of California State Law

Nor is creditor's pre-petition judgement a lien under 28 USC 1962 that would entitle them (and the trustee who fills their shoes) to bring suit against Mrs Constant, because patents have no situs for jurisdictional purposes. "Intellectual property, such as patents, is the most intangible form of property", *Filmtec Corp. v. Allied Signal, Inc.* (CAFC 1991) 939 F2d 1568, 1570 n.5, "with no situs for jurisdictional purposes", see *4 Wright & Miller, Federal Practice and Procedure* 1071, at 429-30 (1987) (rule that jurisdiction can be based on location of property "obviously has no relevance when the debt or obligation is not embodied in a writing at all, as is true of patents").

Thus, creditors are not even lienholders under 28 USC 1962 because their claims based on their pre-bankruptcy judgement lien does not apply to patents. Accordingly, creditors (and the trustee who fills their shoes) are not entitled to file their judgement lien in a court to void the assignment of patents by operation of California state law. Nor does the trustee have rights under 11 USC 544(b) superior to those of unsecured creditors. By bringing its suit to recover patents under California law, the bankruptcy trustee has obtained rights not otherwise available to creditors under judgement lien statute 28 USC 1962.

D. Conflicts Of Decisions

(a) Courts Must Decide Questions On Jurisdiction Before Them

In rejecting the Constant's questions on jurisdiction under 11 USC 455(b) the court of appeals gives no reason why Cal. Codes 3409.04 and 3439.05, and not patent statute 35 USC 261, are the "applicable law" under 11 USC 544(b). While it properly cites jurisdictional statutes 28 USC 157(b)(1) and 28 USC 157(b)(2)(H), it ignores statute 11 USC 544(b) which limits the court's jurisdictional powers to "applicable law". See n.1 in APPENDIX A. And, the court of appeals gives no reason why judgement lien statute 28 USC 1962 is inapplicable. See second paragraph at page 6 in APPENDIX A. This is contrary to decisions of this Court and other Circuits. See citations in Part A *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and the numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2 (courts

lack discretion to ignore questions of jurisdiction of subject matter under Bankr. R. 12(h)(3)), **second**, to explicitly rule that courts must decide questions of jurisdiction brought to their attention by parties or otherwise and, **third**, to resolve the conflicts created by the Ninth Circuit's decision and the decisions in *Moore's Federal Practice 2d ed. 1994* 12-237 n.21 (a party may always suggest that the court lacks jurisdiction) and 12-239 n.23 (court at any stage of the proceedings has a duty to raise such a defect on its own initiative); in the decision of *New York, v. Waterfront Airways, Inc., supra,* (challenges to jurisdiction may be brought to the court's attention by persons other than parties to the action); in the decision of *Sadat v. Mertes, supra,* (the question whether or not there is subject matter jurisdiction is open to challenge at any time and at any level of adjudication); in the decisions of *Eisler v. Stritzler, supra*; *Alexander v. Allister, supra,* (subject matter jurisdiction can be challenged even after judgement); in the decisions of *Wymard v. McCloskey & Co., supra*; *Rice v. Rice Foundation, supra*; *Velez v. Crown Life Ins. Co., supra,* (an appellate court can consider the question of lack of subject matter jurisdiction even on its own motion and even where the issue was not raised in the district court; in the decision of this Court in *Louisville & N.R. Co. v. Mottley, supra,* (even this Court will raise lack of jurisdiction of the subject matter on its own motion when the case reaches that late stage); in the decisions of *Joyce v. United States, supra*; *International Video Corp. v. Ampex Corp., supra,* (where there is no subject matter jurisdiction, a court has no discretion to ignore lack of jurisdiction) and in the decision in *Basso v. Utah Power & Light Co., supra,* (a court lacking subject matter

jurisdiction cannot render judgement, but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking).

(b) Courts Lack Jurisdiction To Void The Assignment of United States Patents By Operation Of California State Law

The court of appeals cites Cal. Codes 3409.04 and 3439.05 for the implied proposition that the courts have jurisdiction to void the assignment of United States Patents under state laws. This is contrary to decisions of this Court and other Circuits. See citations in Part B *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decision in *Allen v. Riley, supra* (state law may not nullify the patent laws of Congress regulating their transfer); and this Court's decisions in *Crown Die & Tool, supra*, and in *US LEd Digest* Courts 291, *supra*, (questions of patent assignments arise under the patent laws)[2], **second**, to explicitly rule that patent statute 35 USC 261 bars the jurisdiction of a court to void the assignment of United States patents by operation of state law[3] and, **third**, to resolve the conflicts created by the Ninth Circuit's decisions and the Seventh Circuit decision in *Unarco Industries, supra* (where federal law excludes state law, the court must apply the federal law).

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[2] The Ninth Circuit itself agrees. See *Geni-Chlor, supra.*

[3] The Ninth Circuit's decision conflicts with decisions in its own Circuit. See *Re Peregrine, supra* 205 footnote 16, 206 footnote 17; *Re Transportation Design, supra* at 639-640.

(c) Courts Lack Jurisdiction To Hear Suits To Void The Assignment of United States Patents By Operation Of California State Law

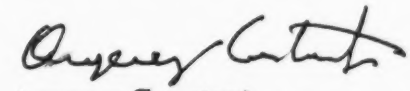
The court of appeals cites Cal. Codes 3409.04 and 3439.05 for the implied proposition that judgement lien statute 28 USC 1962 is not applicable to creditor's prepetition judgements so as to bar the trustee's action in California to recover patents. See second paragraph at page 6 in APPENDIX A. This is contrary to decisions of other Circuits. See citations in Part C *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and the decision in the Federal Circuit in *Filmtec, supra* and in the decisions in *4 Wright & Miller, Federal Practice and Procedure* 1071 at 429-30 (1987) (patents have no situs for jurisdictional purposes) and, **second**, to explicitly rule that judgement lien statute 28 USC 1962 bars the jurisdiction of a court to hear a suit to void the assignment of United States Patents by operation of California state law.

CONCLUSION

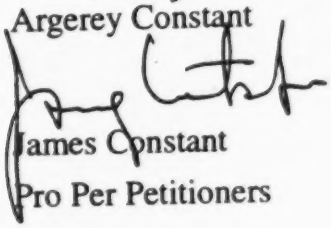
For the reasons set forth above, a writ of certiorari should issue to review the Memorandum opinion of the Court of Appeals on the question of its jurisdiction of subject matter in light of Civil Rule 12(h)(3), patent statute 35 USC 261, and judgment lien statute 28 USC 1962 raised by petitioners.[4]

Dated: 20 October, 1994

Respectfully submitted



Argerey Constant



James Constant

Pro Per Petitioners

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4 If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions and opinions in the federal circuits cited in Parts A through C, *supra*.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(entered 12 September, 1994)

In re: JAMES CONSTANT,	)	Nos. 94-55053
	)	
Debtor,	)	D.C. No.
	)	93-04392-AWT
DAVID L. RAY, RAY & BERGMAN,	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	
	)	
ARGEREY CONSTANT; JAMES CONSTANT,	)	
	)	MEMORANDUM*
	)	
Defendants - Appellants.	)	

Appeal from the United States District Court for the Central District of California Manuel L. Real, District Judge, Presiding

Submitted September 7, 1994**

Before: HALL, WIGGINS, and FERNANDEZ, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir, R, 36-6.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Chapter 7 debtor James Constant and his wife, Argerey Constant, appeal pro se the district court's (1) dismissal of Mr. Constant's appeal for lack of standing, (2) dismissal of Mrs Constant's appeal from certain bankruptcy court decisions for lack of jurisdiction, and (3) sanction award. We have jurisdiction under 28 USC 158(d)[1], and we affirm.

I

STANDING

Mr. Constant contends that the district court erred by not reaching the merits of his appeal on on the ground that he lacked standing to appeal. We disagree.

Mr. Constant relies on Justice Steven's dissenting opinion in Martin v. Wilks for the propositition that interested third parties who have no right to appeal from a final judgement nevertheless may collaterally attack the judgement. See 109 SCt 2120, 2189 (1989) (Stevens, J., dissenting). Although a third party

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[1] We reject the Constant's contention that because the district court dismissed their appeal on standing and jurisdictional grounds, the district court's decision was not final and appealable. See McGuckin v. Smith, 974 F2d 1050,1053 (CA9 1992) (dismissals based on lack of jurisdiction are final and appealable). We also reject the Constant's contention that the bankruptcy and district courts lacked subject matter jurisdiction over the trustee's action to recover fraudulently conveyed patents from Mrs. Constant, and the Constant's appeal from the final judgement in that action. See 28 USC 157(b)(1) (bankruptcy judge may hear and determine core proceeding), 157(b)(2)(H) action to recover fraudulent conveyance is core proceeding), 158(a) (district courts have jurisdiction to hear appeals from final judgements of bankruptcy judges).

may under certain circumstances be able to collaterally attack a judgment, see, e.g., Wells Fargo & Co. v. Taylor, 254 U.S. 175, 184 (1920), a third party whose motion is denied is not a party and may not appeal directly any subsequent decision, see Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 524 (1947); see also Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378 (1987). Moreover, in the bankruptcy context, "[o]nly those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have" standing to appeal the order. Tilley v. Vucurevich (In re Pecan Groves), 951 F2d 242,245 (CA9 1991).

Here, Mr. Constant's motion to intervene was denied. He therefore was not a party to the adversary proceeding. See Brotherhood, 331 US at 524. Moreover, he has conceded that he had no interest in the patents that were subject of the adversary proceeding. Thus, he did not have standing to appeal directly the bankruptcy court's decisions to the district court. See id.; In re Pecan Groves, 951 F2d at 245.

II

DISTRICT COURT'S JURISDICTION.

Mrs Constant appealed three bankruptcy court "decisions" to the district court: (1) the March 12, 1993 judgement avoiding as fraudulent Mr. Constant's transfer of certain patents to his wife; (2) the March 15, 1993 order in aid of judgement, directing Mrs. Constant to assign the patents within ten days or the clerk would do so; and (3) the bankruptcy clerk's June 1,

1993 assignment of the patents. The district court concluded that the June 1, 1993 assignment was not an appealable order and that Mrs. Constant's appeal of the other bankruptcy court decisions was untimely. "The timeliness of a notice of appeal is a question of law which we review de novo". Delaney v. Alexander (In re Delaney), No. 93-16217, slip op. 7817,7819 (CA9 July 15, 1994) (per curiam).

First, district courts "have jurisdiction to hear appeals from final judgements, orders, and decrees, and ... interlocutory orders and decrees of bankruptcy judges". 28 USC 158(a). Here, the June 1, 1993 assignment was not a judgement, order, or decree. Moreover, it was executed by the court clerk, not the bankruptcy judge. Thus, the district court did not err by concluding that it was not an appealable order. See id.

Second, a notice of appeal from the bankruptcy court must be filed with the clerk within ten days from the date of entry of the order appealed from. Bankr. R. 8002 (a). "The provisions of Bankruptcy Rule 8002 are jurisdictional; the untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the bankruptcy court's order". Anderson v. Mouradick, 13 F3d 326,327 (CA9 1994).

Here, Mrs. Constant filed her notice of appeal on June 8, 1993. Because the notice was not filed within ten days of either the March 12, 1993 judgement or the March 15, 1993 order, the district court properly found it untimely. See Bankr. R. 8002(a).

III

DISTRICT COURT SANCTIONS

The Constants contend that the district court erred by sanctioning them for filing a frivolous appeal under Fed. R. Civ. P. 11 and Bank. R. 9011(a) because (1) the sanctions were not based on pleadings signed by the Constants, and (2) the district court never reached the merits of their appeal. We disagree.

A district court reviewing a decision of a bankruptcy court does not have the authority to impose sanctions under Rule 11, see Akros Installations, Inc. v. Grand Nat'l Bank (In re Akros Installations, Inc., 834 F2d 1526,1531 (CA9 1987), but may impose sanctions under the bankruptcy equivalent to Rule 11, Bankr. R. 9011[2], see Hedges v. RTC, Nos. 92-16952, 93-15606, slip op. 7713, 7719-20 (CA9 July 14, 1994) (per curiam). A court may sanction the signers of a pleading or other paper where the paper is frivolous, meaning it is baseless and done without reasonable inquiry. In re Grantham Bros., 922 F2d at 1441.

Here, contrary to their contention, the Constants signed the notice of appeal and appellant's brief submitted to the district court. Thus, the district court had authority to sanction them for filing a frivolous appeal. See Bankr. R. 9011.

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[2] Rule 11 recently was amended to remedy problems arising from certain amendments to the rule. See Fed. R. Civ. P. 11 (as amended Apr. 22, 1993, eff. Dec. 1, 1993) & advisory committee notes to 1993 amendments. Bank. R. 9011 is "virtually identical" to the pre-1993 version of Rule 11. See Valley Nat'l Bank v. Needler (In re Grantham Bros.), 922 F2d 1438,1441 (CA9), cert. denied, 112 SCt 94 (1991).

With respect to Mr. Constant, a reasonable inquiry would have revealed that he lacked standing to appeal because it was clear he was not a party to the adversary proceeding and thus, had no basis to appeal. See Brotherhood, 331 US at 524; see also Oil & Gas Co. v. Duryee, 9F3d 771,773 (CA9 1993) (sanctioning a putative appellant who lacked standing to file bankruptcy petition); cf. Bank of Maui v. Estate Analysis, Inc., 904 F2d 470,472 (CA9 1980) (reversing sanction award where whether party lacked standing had "not been authoritatively decided by this court"). Accordingly, Mr. Constant's appeal was frivolous. See In re Grantham Bros., 922 F2d at 1442.

As to Mrs. Constant, the fact that the district court lacked jurisdiction to consider the merits of her appeal did not preclude it from imposing sanctions. See Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F2d 797,801 (CA9 1986); see also Willy v. Coastal Corp., 112 SCt 1076,1080-81 & n.5 (1992). First, Mrs. Constant argued that the bankruptcy court's judgement violated 28 USC 1962 because patents are intangible property with no situs in any state. Section 1962 is not applicable. See 28 USC 1962. Moreover, the bankruptcy court had authority to enforce its judgement by directing Mrs. Constant to assign her interest in the patent. See Bank. R. 7069; Fed. R. Civ. P. 69(a) (enforcement of judgements shall be in accordance with state procedures); Cal. Civ. Proc. Code 695.010 (all property of judgement subject to enforcement), 697.510(a) (judgement lien on personal property), 700.170 (levy on general intangibles).

Second, Mrs. Constant argued that the bankruptcy court's judgement violates 35 USC 261 because she was the proper

assignee of the patents. The bankruptcy court, however, explicitly found that Mrs. Constant did not act in good faith and was not entitled to the patents. See 11 USC 544; Cal. Civ. Code 3439.04, 3439.05. Thus Mrs. Constant's assignment could not have "trumped" that of the trustee's.

Finally, Mrs. Constant argued that the trustee's motion for sanctions violated Fed. R. Civ. P. 41(b) because the bankruptcy court already ordered the employment and compensation of certain attorneys for the benefit of the estate. An award of sanctions, however, punishes a party for filing a frivolous action, and does not compensate directly the other side's attorney. See Willy, 112 SCt at 1081.

Based on our review of the Constant's pleadings, the district court did not abuse its discretion by sanctioning the Constants. See Hedges, slip op. at 7720 (reviewing for abuse of discretion).

IV

APPELLATE SANCTIONS

The appellee requests that this court impose sanctions against the Constants for filing a frivolous appeal. This court has discretion to impose sanctions for bringing a frivolous appeal, even when a litigant is pro se. 28 USC 1912; Fed. R. App. P. 38; Urban v. Commissioner, 964 F2d 888,890 (CA9 1992) (per curiam). As appeal is frivolous "if the result is obvious, or the arguments of error are wholly without merit". Wilcox v.

Commissioner, 848 F2d 1007,1009 (CA9 1988). This court does not impose sanctions lightly as it is aware that an appeal that lacks merit is not always frivolous. Grimes v. Commissioner, 806 F2d 1451,1454 (CA9 1986) (per curiam).

Because the Constant's appeal is without merit, we impose sanctions of $1,000. See id.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(entered 24 November, 1993)

In re: JAMES CONSTANT,	)	
	)	
Debtor,	)	D.C. No.
	)	93-04392-AWT
DAVID L. RAY,	)	
Chapter 7 Trustee	)	Bankr.Case No.
	)	LA 89-19270 KL
Plaintiff-Appellee,	)	
	)	Adv. No.
	)	LA 91-06842 KL
v.	)	
	)	
ARGEREY CONSTANT,	)	ORDER
an individual,	)	DISMISSING
	)	APPEAL AND
	)	IMPOSING
Defendant-Appellant.	)	SANCTIONS
	)	

BACKGROUND

This is an appeal from an order of the Bankruptcy Court transferring 22 United States patents from Argerey Constant to the bankruptcy estate of James Constant in order to avoid a fraudulent transfer. Both James Constant and his wife have appealed. Mr. Constant is not a party to this adversary proceeding. Appellee has moved to dismiss the appeal and to impose sanctions on both appellants.

DISCUSSION

A. Mr. Constant Has No Standing To Appeal

Mr. Constant moved to intervene in this adversary proceeding. The Bankruptcy Court denied his motion. He did not appeal from that order. The Bankruptcy Court's denial of Mr. Constant's motion to intervene terminated his ability to appeal from any subsequent orders of the Bankruptcy Court. Stringfellow v. Concerned Neighbors In Action, 480 US 370,378 (1987) (applicant whose motion to intervene is denied may "not appeal from any subsequent order or judgement in the proceeding"). Thus, Mr. Constant's present appeal, which is directed to an order made subsequently to the denial of his motion to intervene, is barred.

B. Mrs. Constant's Appeal Is Untimely

Appellants filed their appeal on June 8, 1993. The Bankruptcy Court entered final judgement on March 12, 1993 and entered an Order In Aid Of Judgement Requiring the Assignment of Patents on March 15, 1993. The rules require that a notice of appeal be filed within 10 days after the entry of the order appealed from. Bankr. R. 8002(a). Appellant's filing occurred past this ten-day deadline. The Bankruptcy Clerk's June 1, 1993 execution of the assignment of patents was a purely ministerial act required by the March 15 order, and is not, itself, an appealable order. Mrs. Constant's appeal is, therefore, untimely.

C. The Constant's Appeal Warrants the Imposition of Sanctions

Mrs. Constant's appeal attempts to raise arguments not made in the trial court. These arguments are baseless and were rejected in her husband's previous appeals. More importantly, Mrs. Constant's former attorney warned her of the possibility of being sanctioned if she raised these arguments. The knowingly frivolous nature of Mrs. Constant's appeal warrants the imposition of sanctions.

Mr. Constant's attempt to appeal from an order in a proceeding in which he was not a party warrants the imposition of sanctions. See Oil & Gas Ins. Co. v. Illinois, No. 91-5678, 93 D.A.R. 13366 (CA9 Oct. 21, 1993) (awarding sanctions against appellant whose unauthorized appeal was an attempt to circumvent dismissal of unauthorized petition).

The sanctions against Mr. and Mrs. Constant are awarded for the filing of a frivolous notice of appeal under F. R. Civ. P. 11 and Bankr. R. 9011(a).

CONCLUSION

1. Mr. Constant's purported appeal from the Bankruptcy Court is DISMISSED.

2. Appellant Mrs. Constant's appeal from the Bankruptcy Court is DISMISSED.

3. Appellee's request for sanctions is GRANTED, and appellee is awarded his reasonable attorney's fees and costs in defending this appeal against Mr. and Mrs. Constant, jointly and severally.

4. Within 20 days hereof, appellee shall file and serve his declaration and any supporting papers setting forth the amount of fees and costs claimed. Appellants are granted 14 days from the date appellee's declaration is served on them within which to file any opposition thereto. The matter of the amount of fees and costs shall then stand submitted.

Dated: Nov. 19, 1993

A. WALLACE TASHIMA
UNITED STATES
DISTRICT JUDGE

28 USC 1334 Bankruptcy Cases And Proceedings

(a) Except as provided in subsection

(b) of this section, the district courts shall have jurisdiction of all cases under title 11.

28 USC 157(b)(2)(H) Procedures

(2) Core proceedings include ...

(H) proceedings to determine, avoid, or recover fraudulent conveyances.

11 USC 544(b)

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under **applicable law** by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 of this title.

Bankruptcy Rule 7012 incorporates Civil Rule 12(h)(3), which provides:

Whenever it appears by **suggestion** of the parties **or otherwise** that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

28 USC 1962 Lien

Every judgement rendered by a district court within a State shall be a lien on the property located in such State in the same

manner, to the same extent and under the same conditions as a judgement of a court of general jurisdiction in such State .....

35 USC 261 Ownership; Assignment

. . . . . patents, or any interest therein, shall be assignable in law by an instrument in writing. The ... patentee, or his assigns or legal representatives may in like manner may grant and convey an exclusive right under his ... patents, ..

An assignment ... shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from the date or prior to the date of such subsequent purchase or mortgage.

Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

No. 94-782

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1994

In re: JAMES CONSTANT, *Debtor*

ARGEREY CONSTANT, JAMES CONSTANT,
Petitioners,
v.
DAVID L. RAY, SALTZBURG, RAY & BERGMAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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(408) 283-1222

QUESTIONS PRESENTED FOR REVIEW

Respondents disagree with the petitioners' statement of the questions presented. Petitioners failed to timely appeal from the bankruptcy court's judgment within the mandatory ten-day deadline set forth by Bankruptcy Rule 8002(a). This defect in the Constants' appeal is jurisdictional and requires denial of the Constants' petition for writ of certiorari.

However, if one assumes arguendo that appellate jurisdiction exists for the limited purpose of reviewing the bankruptcy court's subject matter jurisdiction, the only question presented would be:

Did the bankruptcy court have subject matter jurisdiction to hear this "core proceeding" brought by the bankruptcy trustee to recover the bankruptcy estate's fraudulently conveyed assets?

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No. 94-782

IN THE SUPREME COURT

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

In addition to the opinions reproduced in the petitioners' appendix, the following opinions and orders are relevant to the petition:

Bankruptcy Court's Findings of Fact and Conclusions of Law After Trial

Bankruptcy Court's Judgment

Bankruptcy Court's Order in Aid of Judgment Requiring Assignment of Patents

These opinions and orders are set forth in the appendix.

JURISDICTION

The underlying bankruptcy court judgment from which the Constants appeal was entered on March 12, 1993. Pursuant to the mandatory ten-day deadline to appeal set forth by Bankruptcy Rule 8002(a), the Constants' June 8, 1993 Notice of Appeal to the district court was untimely. Therefore, the Constants' petition for writ of certiorari should be denied for lack of jurisdiction.

STATUTES AND RULES

In addition to those statutes and rules cited by petitioners, the following statutes and rules are involved in the case:

28 U.S.C. § 157(b)(1), (b)(2)(H)

28 U.S.C. § 158(a)

Bankruptcy Rules 7070, 8002(a)

California Civil Code §§ 3439.04(a), 3439.05, 3439.07

The pertinent text of these statutes and rules is set forth in the appendix.

STATEMENT OF THE CASE

This case is an adversary proceeding in the bankruptcy of debtor-petitioner James Constant. The Chapter 7 Bankruptcy Trustee, respondent James L. Ray, brought this adversary proceeding against the wife of Mr. Constant, petitioner Argerey Constant, to return to the bankruptcy estate 22 United States patents that the insolvent Mr. Constant fraudulently transferred to her to avoid execution thereon by his creditors.

I. The Fraudulent Transfer[1]

In a prior lawsuit, Mr. Constant sued a number of electronics companies (the "Creditors") in district court, alleging patent infringement. On November 9, 1987, the

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[1] The relevant facts set forth herein are found in the bankruptcy court's findings of fact and conclusions of law after trial. Appendix at 16-30.

district court entered judgment against Mr. Constant and in favor of the Creditors. On May 10, 1988, the district court taxed costs against Mr. Constant in favor of the Creditors in the amount of $123,832.00, with such costs being entered into and made part of the earlier judgment.

Mr. Constant wrote his Creditors and represented that he was insolvent and could not pay the judgment debt. However, when the Creditors wrote to Mr. Constant on August 17, 1988 and informed him that they were prepared to enforce their judgment against him, Mr. Constant acted quickly to frustrate his Creditors.

On August 24, 1988, Mr. Constant assigned to his wife his remaining assets -- his 22 United States patents. The sole consideration purportedly paid by Mrs. Constant for all 22 patents was ten dollars (as found by bankruptcy court in this adversary proceeding, it is doubtful that even this amount was actually paid). In both deposition and at trial, Mr. Constant admitted his intent to hinder his Creditors, that he felt "forced" by the Creditors to assign the patents to his wife.

II. Trial In The Bankruptcy Court

Trustee Ray filed this adversary proceeding against Mrs. Constant in October, 1991 to return the 22 fraudulently transferred patents to the bankruptcy estate. Statutory authority for Trustee Ray's action was provided by the

Bankruptcy Code, 11 U.S.C. § 544(b).[2] Mr. Constant was *not* named as a defendant, and Mr. Constant was never made a party.

On November 9, 1992, the bankruptcy court, Judge Kathleen T. Lax presiding, tried the disputed issues. The bankruptcy court ruled in favor of Trustee Ray. The bankruptcy court issued written Findings of Fact and Conclusions of Law on March 9, 1993, finding that Mr. Constant intended to defraud his Creditors by assigning his patents to his wife, that Mr. Constant did not receive reasonably equivalent value for the patents, that Mr. Constant was insolvent at the time of the assignment, and that Mrs. Constant (who knew of her husband's legal and financial affairs) did not receive the patents in good faith. *See* Appendix at 16-30.

On March 12, 1993, the bankruptcy court entered final judgment, avoiding Mr. Constant's fraudulent transfer and declaring the patents to be part of the bankruptcy estate subject to disposition by Trustee Ray. *See* Appendix at 33. On March 15, 1993, the bankruptcy court entered an Order in Aid of Judgment Requiring Assignment of Patents. *See* Appendix at 36. This Order directed, for recording

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[2] Section 544(b) provides that "[t]he trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor . . . ." Here, the "applicable law" was California's Uniform Fraudulent Transfer Act, Cal. Civ. Code §§ 3439.04(a), 3439.05, and 3439.07. *See In Re Agricultural Research & Technology Group v. Hayes*, 916 F.2d 528, 534 (9th Cir. 1990) (under 11 U.S.C. § 544(b), bankruptcy trustee "stands in the overshoes" of the debtor's creditors for purposes of state law fraudulent conveyance law) (citing *Schneider v. O'Neal*, 243 F.2d 914 (8th Cir. 1957)).

purposes, Mrs. Constant to execute an Assignment of the 22 patents to Trustee Ray and, if Mrs. Constant refused, directed the clerk of the bankruptcy court to execute the Assignment on Mrs. Constant's behalf. *See generally* Bankr. R. 7070. Mrs. Constant failed to execute the Assignment as ordered by the bankruptcy court. Accordingly, on June 1, 1993, the clerk of the bankruptcy court executed the Assignment on behalf of Mrs. Constant. *See* Appendix at 39.

III. Mr. Constant's Attempted Intervention In This Adversary Proceeding

Shortly before the trial, Mr. Constant filed a motion in the bankruptcy court to intervene in this adversary proceeding. Through intervention, Mr. Constant sought to interject into the case the legal arguments (based on 35 U.S.C. § 261 and 28 U.S.C. § 1962) that are asserted in the present petition for writ of certiorari.

Mr. Constant's motion was tardy, being filed long after the discovery cut-off date and the Pretrial Order. The bankruptcy court denied Mr. Constant's motion to intervene for a number of reasons, including the motion's untimeliness and Mr. Constant's admitted lack of legal interest in the patents that had been assigned to his wife.

As determined by the Ninth Circuit, and not contested in the Constants' petition, the bankruptcy court's denial of Mr. Constant's motion to intervene terminated his involvement in this case and foreclosed him from contesting any of the bankruptcy court's actions in this proceeding. *See*

Petitioners' Appendix A, at 3 (Ninth Circuit's opinion rejecting Mr. Constant's appeal for lack of standing). *See generally Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987) (applicant whose motion to intervene is denied may "not appeal from any subsequent order or judgment in the proceeding").

IV. Mrs. Constant's Untimely Appeal

Mrs. Constant is the only party to this adversary proceeding who had standing to raise the statutory arguments presented in the present petition. Her appeal, however, suffers a fatal jurisdictional defect -- she did not timely appeal the bankruptcy court's final judgment to the district court within the mandatory ten-day deadline set forth in Bankruptcy Rule 8002(a).

The bankruptcy court's final judgment was entered on March 12, 1993, and its order in aid of judgment was entered on March 15, 1993. Mrs. Constant (together with her husband) filed her notice of appeal on June 8, 1993, long after the ten-day deadline of Bankruptcy Rule 8002(a). Therefore, as determined by the district court and the Ninth Circuit, there was no jurisdiction of Mrs. Constant's appeal. *See* Constants' Petition, Appendices A and B.

In their petition, the Constants do not dispute that their June 8, 1993 appeal was untimely. *See* Constants' Petition, at 6. Instead, they argue that despite this untimeliness, they may still present arguments going allegedly to the subject matter jurisdiction of the bankruptcy court.

ARGUMENT

I. Mrs. Constant's Failure To Timely Appeal Divested The Appellate Court Of Jurisdiction, And The Constants' Petition Should Be Denied On That Basis

As admitted in the Constants' petition, their appeal from the bankruptcy court's final judgment was untimely under Bankruptcy Rule 8002(a). Based on this untimeliness, the Ninth Circuit concluded there was no appellate jurisdiction, and affirmed the district court's dismissal of the appeal on that basis. *See* Constants' Petition, Appendix A at 3-4.

This ruling was consistent with -- and compelled by -- the holdings of this Court that deadlines to appeal are "mandatory and jurisdictional," and that the failure to meet them precludes appellate review. *See, e.g., Budinich v. Becton Dickenson & Co.*, 486 U.S. 196, 203 (1988) (interpreting Fed. Rules App. Proc. 2, 3(a), 4(a)(1), 26(b)). It was also consistent with intermediate appellate court decisions specifically interpreting, and strictly construing, the ten-day appeal deadline set forth by Bankruptcy Rule 8002(a). *See In re Lane*, 991 F.2d 105, 107 (4th Cir. 1993); *In re Souza*, 795 F.2d 855, 857 (9th Cir. 1986).

Under these well-established authorities, the Constants' failure to timely appeal from the bankruptcy court's final judgment under the "mandatory and jurisdictional" deadline of Bankr. R. 8002(a) bars their present appeal.

The Constants' petition attempts to circumvent this mandatory and jurisdictional rule against late appeals. The Constants argue that Federal Rule of Civil Procedure 12(h)(3), which is incorporated by Bankruptcy Rule 7012, permits a party to contest alleged lack of subject matter jurisdiction even by way of a late and otherwise jurisdictionally barred appeal.

This argument misreads Rule 12(h)(3). The text of the rule states:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

By its own terms, Rule 12(h)(3) applies only to actions that are ongoing. In the present case, the adversary proceeding had already been finally decided, with final judgment entered and all appeals deadlines exhausted. The case was over, and the Constants could not revive it by way of an untimely appeal.

Even the authorities cited in the Constants' petition (none of which permits an *untimely appeal* to challenge lack of jurisdiction) recognize that Rule 12(h)(3) has no application in this matter. *See, e.g., Eisler v. Stritzler*, 535 F.2d 148, 151 (1st Cir. 1976) ("The well established rule in the federal courts is that subject matter jurisdiction may be litigated at any time *before the case is finally decided.*") (emphasis added).

Further, the Constants' fanciful reading of Rule 12(h)(3) would create intolerable uncertainty in the bankruptcy appellate process. Under the Constants' view of the Rule, no matter how (inexcusably) late the appeal, it would still have to be heard if the late appellee involved the mantra of "subject matter jurisdiction." This would undermine entirely the unambiguous and unequivocal deadline to appeal set forth in Bankruptcy Rule 8002(a).

The Constants' appeal from the bankruptcy court's final judgment is untimely and jurisdictionally barred, and their petition for writ of certiorari should be denied on that basis.

II. Regardless, The Bankruptcy Court Had Jurisdiction To Hear This Fraudulent Transfer Action

Even if one assumed, arguendo, that the Constants' position were correct -- that alleged lack of subject matter jurisdiction could be raised by way of any untimely appeal -- the bankruptcy court plainly had subject matter jurisdiction of this adversary proceeding brought by Trustee Ray to recover the bankruptcy estate's fraudulently conveyed assets.

The Bankruptcy Code provides that the bankruptcy court may "hear and determine all cases under title 11 and all core proceedings arising under title 11," subject to review by the district court. 28 U.S.C. §§ 157(b)(1), 158. The present adversary proceeding brought by Trustee Ray pursuant to 11 U.S.C. § 544(b), plainly "arises under" title 11. *See supra* note 2. It is also plainly a "core proceeding"

as defined by the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(H) ("Core proceedings include, but are not limited to . . . proceedings to determine, avoid, or recover fraudulent conveyances"). As such, the bankruptcy court had subject matter jurisdiction.

Neither of the statutory arguments raised in the Constant's petition -- that the patents laws, 35 U.S.C. § 261, preempt fraudulent transfer actions with respect to fraudulently transferred patents, and that 28 U.S.C. § 1962 somehow frustrates Trustee Ray's lawsuit -- goes to the jurisdiction of the bankruptcy court. At most, these arguments would be matters of statutory interpretation to be considered by the bankruptcy court in hearing and determining this proceeding pursuant to 11 U.S.C. § 544(b). They would not affect the subject matter jurisdiction of the court. *Bell v. Hood*, 327 U.S. 678, 776 (1946) (complaint that avers federal cause of action, even if it fails as a matter of law to state a claim, nonetheless raises a federal question conferring jurisdiction unless invoked federal statute "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous"); *accord Duke Power Co. v. Carolina Environ. Study Group*, 438 U.S. 59 70-71 (1978).

Indeed, the Constants' argument that 35 U.S.C. § 261 somehow "preempts" California fraudulent transfer law (which is incorporated by 11 U.S.C. § 544(b)) is precisely the type of merits-based argument going to the defense of an action that has consistently been held *not* to divest the federal courts of jurisdiction. *See Piekarski v. Home Owners Savings Bank*, 956 F.2d 1484, 1489 (8th Cir.) (preemption

defense going to choice of law rather than choice of forum does not raise jurisdictional concerns and may be waived), *cert. denied*, 113 S. Ct. 206 (1992); *Dueringer v. General American Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988) (same); *Johnson v. Armored Transport*, 813 F.2d 1041, 1043-1044 (9th Cir. 1987) (same).

Neither of the arguments presented in the Constants' petition goes to the subject matter jurisdiction of the bankruptcy court. Thus, even under the Constants' erroneous view of Federal Rule of Civil Procedure 12(h)(3), the district court's and the Ninth Circuit's rejection of their appeal as untimely was proper.

III. On The Merits, The Constants' Arguments Are Baseless

As shown above, Mrs. Constant's failure to timely appeal from the bankruptcy court's final judgment, and the denial of Mr. Constant's motion to intervene, foreclose the Constants from making the statutory arguments presented in their petition. However, since the Constants' petition presents these arguments on the merits, Trustee Ray will respond very briefly.

Nothing in the language or the legislative history of the bankruptcy or patent laws suggests that fraudulently transferred patents should be exempt from the operation of state fraudulent transfer law incorporated by 11 U.S.C. § 544(b). Nor would it be sensible public policy to permit an insolvent patent owner to fraudulently convey his or her

patents with impunity, to the detriment of his or her creditors.

Specifically, the assignment provisions of the United States patent laws do not speak to the avoidance of fraudulently transferred patents. Rather, they simply provide that "[a]n assignment . . . shall be void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, unless it is recorded" in the Patent Office. 35 U.S.C. § 261. Section 261 does not indicate any congressional intent to preempt the operation of state fraudulent transfer law with respect to patents.

As this Court held in *Allen v. Riley*, 203 U.S. 347 (1906), the assignment provisions of the United States patent laws leave the states with "the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud." *Id.* at 355. "[Congress] has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various states the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee." *Id.* at 356. Under *Allen*, the states have the power to regulate and proscribe the fraudulent transfer of patents to the detriment of creditors.[3]

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[3] The Constants' citation to *In re Peregrine*, 116 Bankr. 194 (C.D. Cal. 1990), is unavailing. That case had nothing to do with fraudulent transfer law or this case, and did not purport to challenge this

Moreover, even assuming arguendo that 35 U.S.C. § 261 somehow operated to limit state fraudulent transfer claims, it would not help Mrs. Constant in this case. The bankruptcy court's factual findings of Mrs. Constant's lack of good faith and her knowledge of the fraudulent nature of the assignment (Appendix at 21-25) would preclude any conceivable reliance on Section 261 to frustrate Trustee Ray's fraudulent transfer action. *See* Constants' Petition, Appendix A, at 7. Mrs. Constant was not a "subsequent purchaser . . . for valuable consideration" or "without notice" of the fraudulent nature of the conveyance. 35 U.S.C. § 261.

The Constants' reliance on 28 U.S.C. § 1962 (judgments shall be liens on property located in state) is also unfounded. That section has no application to fraudulent conveyance law. Under 11 U.S.C. § 544(b) and Bankruptcy Rule 7070, the bankruptcy court had the authority to avoid Mr. Constant's fraudulent transfer of patents to Mrs. Constant, who was properly before the Court and did not dispute its personal jurisdiction over her. *See also* Constants' Petition, Appendix A, at 6.

In short, nothing in the United States patent laws prevents the straightforward application of California fraudulent transfer law, incorporated by 11 U.S.C. § 554(b), to the bankruptcy estate's recovery of fraudulently transferred patents.

Court's explicit language in *Allen* regarding the states' power to regulate fraudulent transfers of patents.

CONCLUSION

The Constants' untimely appeal from the bankruptcy court's final judgment precludes their merits-based arguments, and their petition for writ of certiorari should be denied on this basis. In any event, the Constants' petition fails to present any special and important reasons for granting certiorari. The bankruptcy court plainly had subject matter jurisdiction of this fraudulent transfer action, and nothing in the patent laws prevents the application of state fraudulent transfer law to allow the bankruptcy trustee to return fraudulently transferred patents to the bankruptcy estate.

Date: November 28, 1994

Respectfully submitted,

ANTHONY de ALCUAZ
Counsel of Record for
Respondents *David L. Ray and Saltzburg, Ray and Bergman*

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APPENDIX

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	) CHAPTER 7
JAMES CONSTANT,	) Case No. LA 89-19270 KL
DAVID L. RAY, Chapter 7 Trustee,	) Adv. Case No. LA91-06842-KL
Plaintiff,	) FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	) AFTER TRIAL
ARGERY CONSTANT, an individual,	) Entered: March 12, 1993
Defendant.	)

The above cause came on for trial on November 9, 1992. The matter was heard and submitted on November 9, 1992 and this Court issued its oral findings of fact, conclusions of law and orders thereon on November 10, 1992. The Court having heard the evidence and the arguments of counsel and the matter having been submitted, the Court finds and concludes as follows.

SUMMARY OF DECISION

Plaintiff Trustee Ray sued defendant Argerey Constant seeking to avoid the transfer of 22 United States patents (Exhibits 1-22) to Argerey Constant by her husband,

defendant James Constant. Trustee Ray asserts that the conveyance of the 22 United States patents to Argerey Constant by James Constant is voidable as a fraudulent conveyance.

This cause comes before the Court pursuant to 11 U.S.C. § 544(b) and under California Civil Code Sections 3439.04 and 3439.05. (Unless otherwise stated, citations to statutes below refer to the California Civil Code.) Mrs. Constant has raised a defense, under Section 3439.08(a), to Trustee Ray's claims under Section 3439.04(a).

In summary, with reference to this applicable law, the Court finds for Trustee Ray under Section 3439.04(a) and (b), and finds against the defendant on the defense contained in 3439.08(a). The Court further finds for Trustee Ray under Section 3439.05.

Specific findings of fact and conclusions of law are set forth below.[1]

FINDINGS OF FACT

1. Issue: Were the AMD Defendants (the defendants before the United States District Court for the Central District of California in Civil Action No. 85-0262-SVW, entitled James Constant v. Advanced Micro Devices, Inc. et al. (the "Patent Action")) creditors at the time of the challenged assignment from Mr. Constant to Mrs. Constant, i.e., on August 24, 1988?

---

[1] Other undisputed facts, which support and form the basis of these findings and conclusions, are contained in the Admitted Facts portion of the Joint Pretrial Order.

The Court finds that the AMD Defendants were creditors of debtor Mr. Constant prior to and at the time of the challenged assignment. This finding is supported, inter alia, by the following exhibits and testimony: Exhibit 30 (the May 10, 1988 Order re-taxing costs in the Patent Action); Exhibit 28 (the District Court docket in the Patent Action showing the entry of the Order dated May 10, 1988); Exhibit 23 (the letter from Adrian Pruetz, counsel for Fujitsu, to James Constant dated June 27, 1988, which Mr. Constant has admitted receiving and which referred to the Order re-taxing costs (Exhibit 30) and enclosed a copy of such order to Mr. Constant); Exhibit 24 (Mr. Constant's letter of July 12, 1988 to Ms. Pruetz acknowledging receipt of Exhibit 23 and acknowledging Mr. Constant's obligation to the AMD Defendants under the Order re-taxing costs); the testimony of Mr. Constant during trial, during which he acknowledged that he understood prior to the date of the challenged assignment to his wife that he was a debtor and that the AMD Defendants were creditors based upon the Order re-taxing costs (Exhibit 30); and, the claims filed by the AMD Defendants in the bankruptcy of James Constant, judicial notice of which may be taken by this Court or any reviewing Court of Appeal.

2. Issue: Was the assignment by Mr. Constant to Mrs. Constant on August 24, 1988 made with the actual intent to hinder, delay or defraud the creditors of Mr. Constant?

The Court finds that Mr. Constant's assignment of the 22 United States patents in question to his wife on August 24, 1988 was made with the actual intent to hinder, delay and defraud his creditors. This finding is supported, inter alia, by the following evidence.

During trial, Mr. Constant testified that the existence of the Order re-taxing costs was at least one reason for the assignment to his wife and that he felt that he was "forced" into such assignment by the efforts of the AMD Defendants to enforce their judgment in the Patent Action. Mr. Constant's deposition testimony also confirms that he did not want the AMD Defendants to get his patents.

Moreover, this Court has examined the "Badges of Fraud" set forth, for example, in In Re Woodfield, 92 Daily Journal D.A.R. 14385, 1992 U.S.App. LEXIS 26902 (9th Cir. October 22, 1992) and in other cases and comment set forth in Plaintiff's Trial Brief at pages 16-18. Having considered the evidence relating to such Badges of Fraud, this Court finds that such consideration supports a finding of actual intent to hinder, delay and defraud in that:

(a) A close husband-wife relationship existed between Mr. Constant and Mrs. Constant which had a history of undocumented financial transactions between them;

(b) The assignment in question was made in anticipation of collection actions by the AMD Defendants. Exhibits 24, 25 (the August 17, 1988 letter from Craig Summers to James Constant confirming to Mr. Constant that the AMD Defendants intended to take action to enforce their judgment on or before August 27, 1988), and 26 (the August 24, 1988 assignment from Mr. Constant to Mrs. Constant), taken together with Mr. Constant's testimony concerning the motivation for the assignment discussed above, show that the assignment from Mr. Constant to Mrs. Constant was made three days before the date upon which the AMD Defendants had indicated that they would commence enforcement of the judgment in the Patent Action. To the extent Mr. Constant's

testimony at trial asserted that the AMD Defendants would have been unable to execute upon the judgment given his lack of assets, and that, therefor, the assignment was not motivated by the anticipation of collection efforts by the AMD Defendants, the Court finds that Mr. Constant's testimony is inconsistent with his actions in assigning the patents to his wife within the time set by Mr. Summers in Exhibit 26;

(c) Mr. Constant was insolvent at the time of the challenged assignment. Mr. Constant's testimony at trial, together with Exhibit 24 (Mr. Constant's July 12, 1988 letter to Ms. Pruetz), the deposition testimony of Mr. Constant read during trial, and the May 10, 1992 Order re-taxing costs in the amount of $123,832.00 against Mr. Constant, demonstrate that at the time of the assignment the sum of Mr. Constant's debts were greater than all of his assets and that Mr. Constant has generally not paying his debts and they became due;

(d) Mr. Constant's and Mrs. Constant's testimony concerning the August 24, 1988 assignment and previous assignments of property between Mr. and Mrs. Constant demonstrate that substantially all of Mr. Constant's property was transferred to Mrs. Constant on or before August 24, 1988 and that the August 24, 1988 transfer of the patents comprised an assignment of substantially all of Mr. Constant's remaining assets;

(e) Because in the years preceding August 24, 1988 Mr. Constant had transferred to Mrs. Constant substantially all of his assets, save the 22 patents which are the subject of this fraudulent transfer action, the assignment of the 22 patents in question from Mr. Constant to Mrs. Constant depleted the debtor's assets such that the creditors

have been effectively hindered and delayed in recovering any part of their judgment. Mr. and Mrs. Constant's testimony from the stand during trial, Exhibit 24 (the July 12, 1998 from Mr. Constant to Mrs. Pruetz) and the bankruptcy schedules filed by Mr. Constant herein demonstrate that at the time of the assignment of the patents in question to his wife, Mr. Constant had depleted substantially all of his assets, thereby hindering and delaying the AMD Defendants and other creditors;

(f) For the reasons stated more fully below, the assignment from Mr. Constant to Mrs. Constant of the 22 patents in question was not supported by adequate compensation.

Having found that each of the Badges of Fraud was present in this transaction, and that Mr. Constant's testimony at trial supports the existence of an actual intent to hinder, delay and defraud, and having noted that Mr. Constant's deposition testimony, read in open court during trial and submitted as part of the record herein, further supports such finding, this Court has found that Mr. Constant did convey the 22 patents in question to his wife with such actual intent.

3. Issue: Did Argerey Constant receive the assignment of the 22 patents in question in good faith?

This Court finds that Mrs. Constant did not receive the assignment of the 22 patents in question in good faith because, inter alia, Mrs. Constant knew of the existence of the Patent Action and knew of the existence of the Order re-taxing costs against Mr. Constant at the time of the assignment.

Mrs. Constant testified in deposition that, prior to the February 27, 1992 date of her deposition, she did not know that Mr. Constant had been ordered to pay fees and costs to the AMD Defendants in the Patent Action. See Mrs. Constant's February 27, 1992 deposition transcript, page 28, line 10 to page 29, line 5. At trial, Mrs. Constant's testimony ultimately was that she did not recall whether she did or did not know that the Order re-taxing costs had been entered. In this regard, the Court specifically finds that the testimony of Mrs. Constant and Mr. Constant, to the extent that either testified, that Mr. Constant did not inform Mrs. Constant of the existence of the Order re-taxing costs at the time of the Order on May 10, 1988, is not credible. Mr. Constant testified, and Mrs. Constant confirmed, that Mr. Constant kept Mrs. Constant informed as to the general progress of the Patent action. Mr. Constant testified that he informed his wife of "significant points." It is not credible to assert either that the award of $123,832.00 against Mr. Constant in the Patent Action was not a "significant point" or that the award was not discussed between Mr. and Mrs. Constant. Mr. Constant could not deny that he had informed Mrs. Constant about the Order. The Court's finding that Mr. Constant did, in fact, inform Mrs. Constant of the Order re-taxing costs is supported by the testimony discussed above, and further supported by deposition testimony of Mr. Constant read into the record during trial.

As further evidence of Mrs. Constant's lack of good faith, Mrs. Constant testified during trial that she had no use for and made no use of the 22 patents in question except for "sentimental value." This fact, taken in conjunction with Mr. and Mrs. Constant's other actions with respect to the patents (see Findings for Issue 4 below, including subparagraph (b)), further supports a finding that Mrs. Constant did not receive the patents in good faith.

4. Issue: Did Mr. Constant receive reasonably equivalent value in exchange for the assignment of the 22 patents in question?

This Court finds that Mr. Constant did not receive reasonably equivalent value in exchange for the transfer of the 22 patents in question. Both Mr. and Mrs. Constant testified at trial that $10.00 was the sole consideration for the assignment at issue. Exhibits 41 and 42 (the Requests for Admission of plaintiff, together with the responses thereto of defendant Argerey Constant) further support the finding that at most $10.00 was the sole consideration for the conveyance.

This Court is not satisfied that this $10.00 amount was actually paid by Mrs. Constant to Mr. Constant, and makes no finding that such payment was actually paid. However, even if Mrs. Constant paid Mr. Constant the $10.00, the Court finds that $10.00 was not reasonably equivalent value for the 22 patents. While this Court finds that Mr. Constant's rejection of the proposal contained within Exhibit 26 (Mr. Summers' letter of August 17, 1988) does not establish the value of the patents at or near the time of the assignment because other items were included in the demanded consideration for such proposal, this Court finds that other credible evidence establishes that $10.00 was not reasonably equivalent value for the 22 patents in question on August 24, 1988, including inter alia:

(a) The cost of obtaining the patents -- Mr. Constant testified both at trial and during deposition that such cost was likely been between $500 and $2,000 per patent for Patent Office fees and attorneys' fees. These costs indicate that it is likely that the patents had some value and that such value was likely in excess of ten dollars. The

testimony of Paul J. Winters, an expert called by plaintiff Trustee Ray during trial, establishes that at the time of the assignment Patent Office fees to apply for and have issued a United States patent were at least $165 per patent, and that substantial additional attorneys' fees to obtain those patents would likely also have to be incurred;

(b) Mrs. Constant, on or about April 16, 1990, paid the Patent Office $225.00 in fees to maintain for a period of three and one-half years (out of the 17-year life of a patent) just one of the 22 Patents. See Exhibit 27 (a certified copy of Patent Office documents showing the payment by check by Argerey Constant of a maintenance fee in the amount of $225 for United States Patent No. 4,620,290) and the related testimony of Mr. and Mrs. Constant at trial. This fact supports a finding that Mrs. Constant believed that the maintenance of a single one of the 22 patents in question for a period of three and one-half years was worth at least $225. Mr. Constant testified that he probably advised Mrs. Constant to pay this maintenance fee. Accordingly, both Mr. and Mrs. Constant believed that the patents here in issue had more than "sentimental value," and that the value of the single patent upon which the maintenance fee was paid for a period of three and one-half years was substantially greater than $10.00;

(c) Mr. and Mrs. Constant's failure to successfully generate income from the patents in question does not, as contended by her, establish that the patents had no value. Mr. Winters testified that the value of the 22 patents would be based upon both their offensive and their defensive value, and that such offensive and defensive value was substantially greater than $10.00 in 1988. This Court finds that Mr. Winters' experience, training, and expertise in the areas of the valuation of patents and licenses thereunder, and the

costs entailed in obtaining and maintaining patents, support his conclusions in this regard.

Accordingly, this Court finds that Mr. Constant did not receive reasonably equivalent value for the conveyance of the 22 patents in question on August 24, 1988.

5. Issue: Did Mr. Constant believe or, should he have reasonably believed, that he would incur debts in the future beyond his ability to pay as they became due?

This Court finds that Mr. Constant did believe, and reasonably should have believed, that by virtue of the assignment in question, and his previous conveyances of his real and personal property to his wife, he would be unable to pay debts incurred in the future. At trial Mr. Constant testified that his business was as an inventor. A portion of this business, was Mr. Constant's enforcement of patents. This, in turn, required funds for the purpose of enforcing patents. Before 1988, Mr. Constant had brought lawsuits and had lost judgments in those prior cases. Mr. Constant should have been aware and this Court finds he was aware, that by conveying the 22 patents in question to his wife, he was effectively rendering himself unable to pay debts which he reasonably should have anticipated incurring in the course of his enunciated profession, i.e., an inventor who obtains and enforces patents.

6. Issue: Was Mr. Constant insolvent at the time of the assignment?

For the reasons set forth above, this Court finds that Mr. Constant was insolvent at the time of the August 24, 1988 assignment to his wife. In addition to the evidence discussed above, Mr. Constant testified at trial that he could

not pay his obligations currently in August 1988. Mrs. Constant confirmed this fact. Mr. Constant's attempt to establish that he was solvent by placing a value upon the causes of action that he either had or could have asserted in August 1988 does not establish the value of those claims. Any such valuation is purely speculative, and further is contradicted by the eventual outcome of Mr. Constant's other patent infringement lawsuits, which he lost. As discussed more fully above, Exhibit 24, and Mr. Constant's financial statement filed with the District Court discussed in Exhibit 24, establish Mr. Constant's admitted insolvency on an asset/liability basis, and Mr. Constant's testimony at trial that he could not pay his obligations currently in August, 1988 establishes that he did not have that ability at the time of the assignment to his wife.

7. Issue: Assuming Mr. Constant was not insolvent immediately before the assignment of the 22 patents, did he become insolvent as a result of the assignment?

If Mr. Constant were not already insolvent before the assignment of the 22 patents in question to his wife on August 24, 1988, this Court finds that such assignment rendered Mr. Constant insolvent thereafter. As confirmed by Mr. and Mrs. Constant and by the deposition testimony of Mr. Constant read during trial and submitted as part of this record, Mr. Constant had no independent source of income in 1988, had been supported by and conducting his business with funds lent to him by Mrs. Constant for some time in 1988, and Mr. Constant had conveyed substantially everything of value he owned except the 22 patents in question to Mrs. Constant prior to August 24, 1988. Therefore, the assignment of the 22 patents in question to his wife on August 24, 1988 rendered Mr. Constant insolvent to

the extent that he was not insolvent prior to such assignment. Again, Mr. Constant's testimony, Mrs. Constant's testimony and Exhibit 24 establish that Mr. Constant was insolvent upon such date using any measure of insolvency.

FURTHER ISSUES OF FACT SET FORTH IN THE JOINT PRETRIAL ORDER

Upon the "Facts Remaining to be Litigated" set forth in the Joint Pretrial Order, the Court finds as follows:

1. This Court finds that the District Court in the Patent Action entered an Order granting defendants' motion to re-tax costs and denying plaintiff's motion to dismiss and disallow costs and for sanctions on May 10, 1988 (Exhibit 30). This Court finds that pursuant to such Order, the AMD Defendants were awarded certain costs of suit; said costs amount to $123,832.00 plus interest from November 9, 1987. This Court finds that the judgment of the District Court was affirmed by the United States Court of Appeals for the Federal Circuit (Exhibit 31) and that certiorari was denied by the United States Supreme Court (Exhibit 37).

2. For the reasons stated above, and based upon the admissions of both Mr. and Mrs. Constant at trial, this Court finds that the sole consideration paid by Mrs. Constant to Mr. Constant for the assignment of the subject patents was ten dollars (if such amount was actually paid).

3. For the reasons stated above, and more particularly based upon the exhibits enumerated in this paragraph, this Court finds that at the time of the assignment, the AMD Defendants were creditors of Mr. Constant under the definition of Section 3439.01(c) of the

California Civil Code. This conclusion is supported by Exhibit 30 (Order granting motion to re-tax costs), Exhibit 28 (docket sheet in the Patent Action indicating entry of Order and Mr. Constant's appeal therefrom), Exhibit 31 (Court of Appeals decision), Exhibit 36 (the Court of Appeals opinion), Exhibit 37 (Denial of Certiorari), Exhibits 38 and 39 (bankruptcy filings of James Constant listing the claims of the AMD Defendants), Exhibit 24 (July 12, 1988 letter from Mr. Constant to Adrian Pruetz acknowledging the obligation created by the Order re-taxing costs).

4. For the reasons stated above, this Court finds that at the time of the assignment Mr. Constant was a debtor of the AMD Defendants under the definition of Section 3439.01(e) of the California Civil Code.

5. This Court finds that at the time of the assignment the AMD Defendants had claims against Mr. Constant under the definition of Section 3439.01(b) of the California Civil Code for which Mr. Constant was liable and that such claims amounted to $123,832.00 plus interest from November 9, 1987. Such finding is based upon the evidence discussed above, including the claims of the AMD Defendants herein of which this Court and any reviewing court may take judicial notice at any time.

6. This Court finds that from November 9, 1987 the AMD Defendants were creditors of Mr. Constant under the definition of Section 3439.01(c) of the California Civil Code. Such finding is based upon the evidence discussed above, including, inter alia, Exhibit 28 (District Court docket sheet) Exhibit 29 (November 6, 1987 Judgment in the Patent Action); Exhibit 30 (May 10, 1988 Order re-taking costs); Exhibit 31 (Court of Appeals Judgment); Exhibit 36 (Court of Appeals opinion); Exhibit 37 (Supreme Court denial of

certiorari); Exhibits 38 and 39 (Mr. Constant's bankruptcy petition and schedules); and the trial testimony of Mr. Constant.

7. For the reasons set forth above, this Court finds that from November 9, 1987 Mr. Constant was a debtor of the AMD Defendants under the definition of Section 3439.01(e) of the California Civil Code.

8. For the reasons set forth above, this Court finds that from November 9, 1987 the AMD Defendants had claims against Mr. Constant under the definition of Section 3439.01(b) of the California Civil Code for which Mr. Constant was liable and, from May 10, 1988, said claims amounted to $123,832.00 plus interest from November 9, 1987.

9. For the reasons set forth above, this Court finds that Mr. Constant made the assignment of the subject patents with actual intent to hinder, delay and defraud his creditors, including the AMD Defendants.

10. For the reasons set forth above, this Court finds that at the time of the assignment, August 24, 1988, Mr. Constant was insolvent under the definition of Section 3439.02 of the California Civil Code or became insolvent as a result of the assignment.

11. For the reasons set forth above, this Court finds that at the time of the assignment, August 24, 1988, at fair valuations, Mr. Constant's debts were greater than all his assets.

12. For the reasons stated above, this Court finds that at the time of the assignment, August 24, 1988, Mr.

Constant was not generally paying his debts as they became due. This finding is also supported, inter alia, by Exhibit 24 and Mr. and Mrs. Constant's testimony at trial.

13. For the reasons stated above, this Court finds that the fair market value of the 22 patents at the time of the assignment on August 24, 1988 was greater than $10.00, and probably substantially greater than $10.00.

14. This Court makes no finding upon factual issue No. 14 in the Joint Pretrial Order because the determination of the actual fair market value of the 22 patents in question on August 24, 1988 is not an issue necessary to any finding of this Court stated herein.

15. For the reasons stated above, this Court finds that Mr. Constant did not receive reasonably equivalent value in exchange for his assignment of the subject patents to Mrs. Constant.

16. For the reasons stated above, this Court finds that Mrs. Constant did not take the subject patents in good faith and for reasonably equivalent value.

17. For the reasons stated above, and further noted below, this Court finds that Ray and Mr. Constant's creditors have been, and without the intervention of this Court will continue to be, irreparably injured by the fraudulent transfer and by Mr. and Mrs. Constant's wrongful conduct in assigning and maintaining the assignment of the 22 patents in question.

ISSUES OF LAW FROM JOINT PRETRIAL ORDER

On the issues of law described in the Joint Pretrial Order, this Court concludes as follows:

1. This Court concludes that the assignment executed by Mr. Constant on August 24, 1988 was a fraudulent transfer within the meaning of Section 3439.04(a) and 3439.04(b)(2) of the California Civil Code.

2. This Court concludes that the assignment executed by Mr. Constant on August 24, 1988 was a fraudulent transfer within the meaning of Section 3439.05 of the California Civil Code.

3. Defendant Argerey Constant having withdrawn and abandoned the arguments and defenses giving rise to the issues of law listed in paragraph No. 3 on page 6 of the Joint Pretrial Order, the Court makes no finding as to the issues stated therein.

4. The AMD Defendants had allowable claims against Mr. Constant at the time of the assignment.

5. A cause of action under 11 U.S.C. § 544 does not require the AMD Defendants or other persons to have been creditors of Mr. Constant at the time of the assignment. See also Cal. Civ. Code § 3439.04 ("claim arose before or after the transfer"). Regardless, as found above, the AMD Defendants were creditors of Mr. Constant at the time of the assignment.

6. Having determined that the assignment of August 24, 1988 was a fraudulent transfer under both Sections 3439.04 and 3439.05 of the California Civil Code,

this Court further finds that Trustee Ray is entitled to and should be awarded the following remedies, inter alia:

A. The avoidance of the assignment dated August 24, 1988 for each and every of the patents listed therein;

B. The issuance of attachments or such other orders as may be necessary to secure recovery of the patents by Trustee Ray;

C. The issuance of an injunction against Mrs. Constant and other persons acting in concert with Mrs. Constant from further transferring or otherwise encumbering the subject 22 patents, pursuant to Section 3439.07 of the California Civil Code.

Date: March 9, 1993

Kathleen T. Lax
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	) CHAPTER 7
JAMES CONSTANT,	) Case No. LA 89-19270 KL
DAVID L. RAY, Chapter 7 Trustee,	) Adv. Case No. LA91-06842-KL
Plaintiff,	) JUDGMENT
vs.	) Entered: March 12, 1993
ARGERY CONSTANT, an individual,	)
Defendant.	)

In accordance with the findings of fact and conclusions of law signed by the Court after trial on March 9, 1993, and entered thereafter.

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that:

1. The August 24, 1988 assignment by James Constant to Argerey Constant of the following 22 United States Letters Patent (hereinafter "Patents") is hereby avoided:

United States Patent No. 3,691,557
United States Patent No. 3,790,939

United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481
United States Patent No. 4,156,919
United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930.

All of the Patents are the property of the bankruptcy estate and shall be subject to disposition by Chapter 7 Trustee David L. Ray in accordance with the United States Bankruptcy Code and Rules.

2. Defendant Argerey Constant and all persons in active concert or participation with her (including without limitation James Constant) are permanently enjoined from assigning, transferring, dedicating to the public, licensing, encumbering, or otherwise disposing of any of the Patents.

3. The Court shall retain jurisdiction of this action and the parties to (i) issue such attachments or such other orders as may be necessary to aid in execution of this

Judgment and to secure recovery of the Patents by Trustee Ray, and (ii) hear and determine Trustee Ray's applications for the award of fees, costs and expenses in this action.

This judgment constitutes the final judgment of this action and shall be entered forthwith by the Clerk of the Court.

Dated: March 9, 1993

Kathleen T. Lax
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	) CHAPTER 7
JAMES CONSTANT,	) Case No. LA 89-19270 KL
DAVID L. RAY, Chapter 7 Trustee,	) Adv. Case No. LA91-06842-KL
Plaintiff,	) ORDER IN AID OF JUDGMENT REQUIRING ASSIGNMENT OF PATENTS
vs.	
ARGERY CONSTANT, an individual,	) Entered: March 15, 1993
Defendant.	

This action having been tried to the Court, the Court having rendered its findings of fact and conclusions of law and the following order being necessary to aid the execution of the Court's previous findings, conclusions, orders and judgment,

IT IS HEREBY ORDERED:

1. The U.S. Patents listed immediately below are hereby assigned to the Chapter 7 Trustee in this bankruptcy case, David L. Ray:

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481
United States Patent No. 4,156,919
United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930.

2. Within ten (10) days of entry of this Order, Defendant Argerey Constant (i) shall execute an assignment of the above patents to the U.S. Trustee in the form attached as Exhibit A hereto; (ii) shall have such assignment notarized; and (iii) shall deliver such notarized assignment to Trustee Ray with copy to his counsel.

3. If Mrs. Constant fails to so execute, have notarized, and deliver the assignment to the Chapter 7 Trustee within ten (10) days of the date of entry of this Order, the Clerk of this Court is ordered to execute such assignment and such assignment shall have the same force

and effect as if executed by Mrs. Constant and shall be binding upon Mrs. Constant, her heirs and her actual or purported assignees.

Dated: March 9, 1993

Kathleen T. Lax
United States Bankruptcy Judge

ASSIGNMENT OF UNITED STATES LETTER PATENTS

Whereas I, Argerey Constant, residing at 1603 Danbury Drive, in the City of Claremont, County of Los Angeles, and State of California, am the record title holder of the following Letter Patents of the United States:

United States Patent No. 3,691,557
United States Patent No. 3,790,939
United States Patent No. 3,798,644
United States Patent No. 3,858,203
United States Patent No. 3,896,435
United States Patent No. 3,965,342
United States Patent No. 3,965,472
United States Patent No. 3,971,993
United States Patent No. 3,988,572
United States Patent No. 4,025,772
United States Patent No. 4,053,750
United States Patent No. 4,067,009
United States Patent No. 4,082,991
United States Patent No. 4,117,481
United States Patent No. 4,156,919
United States Patent No. 4,164,740
United States Patent No. 4,187,000
United States Patent No. 4,228,517
United States Patent No. 4,292,579
United States Patent No. 4,620,290
United States Patent No. 4,707,698
United States Patent No. 4,737,930

I, Argerey Constant, hereby assign to the Chapter 7 Trustee, David L. Ray, the entire right, title and interest, in and to each of the above-referenced Letters Patents to the

full end of the term for which said Letters Patents are granted, as fully and entirely as the same would have been held by me had this assignment and sale not been made.

Executed this 1st day of June, 1993, at Los Angeles, California.

ARGEREY CONSTANT

Frank E. Goodroe
Clerk of the Court

United States Bankruptcy Court
Central District of California

STATUTES AND RULES

The following is the pertinent text of the statutes and rules involved in this case in addition to those set forth in petitioners' appendix:

28 U.S.C. § 157(b)(1), b(2)(H)

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to --. . . .

(H) proceedings to determine, avoid, or recover fraudulent conveyances.

28 U.S.C. § 158(a)

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

Bankruptcy Rule 7070

Rule 70 F.R.Civ.P. applies in adversary proceedings and the court may enter a judgment divesting the title of any party and vesting title in others whenever the real or personal property involved is subject to the jurisdiction of the bankruptcy court.

Bankruptcy Rule 8002(a)

The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within (10) days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

California Civil Code § 3439.04(a)

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

California Civil Code § 3439.05

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

California Civil Code § 3439.07(a)(1)

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim . . . .